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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

STAR ENTERPRISE,
Petitioner,

V.

MATTHEWS SMITH ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an injunction or document preservation order which affects the creation of documents and thus restricts a party's prospective use of its communication system constitutes a prior restraint on free speech in violation of the First Amendment.

2. Whether a district court, through legislation or rule, is authorized to use an injunctive document preservation order to affect future communications.

3. Whether the district court erred in granting an overly broad preliminary injunction and then reissuing it in modified form despite Smith's failure to meet the requirements for an injunction.

LIST OF PARTIES

Petitioner

1. Star Enterprise

Respondents

3. Matthews Smith
4. Karen Love
5. Darlene Greene
6. Kenneth Ford
7. John Lumpkins
8. John Comeaux

RULE 29.1 LISTING

The following are the parent companies, subsidiaries, or affiliates of petitioner Star Enterprise that have issued shares of stock to the public:

1. Texaco Inc. (a defendant in the underlying case)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Star Enterprise ("Star") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unreported and is reproduced in the Appendix as A-1. The opinion of the district court is reported at 951 F. Supp. 109 (E.D. Tex. 1997) and is reproduced in the Appendix as A-2.

JURISDICTION

The jurisdiction of the United States Court of Appeals for the Fifth Circuit was invoked under 28 U.S.C. § 1292(a)(1) and the judgment was entered on June 3, 1997. The Court of Appeals' denial of the Petitioner's timely petition for panel rehearing on August 5, 1997 is unpublished and is reproduced in the Appendix as A-19.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND OTHER PROVISIONS

I. U.S. Const. Amend. 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II. 28 U.S.C. § 2072

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

STATEMENT OF THE CASE

I. *Statement of Facts*

Petitioner, Star Enterprise ("Star"), was formed on January 1, 1989.[1] Most of Star's facilities were once owned and operated by Texaco or its subsidiaries prior to Star's formation in 1989. As a result, Texaco still had some documents in storage at some of Star's facilities, including its refinery in Port Arthur, Texas (the "Port Arthur plant"). These Texaco records were located in the "Old Records Room." In May, 1996, Star's general counsel requested that Texaco move its pre-1989 Texaco documents from Star's various facilities. (II R. 114-15). In December, 1996, Texaco began the very ordinary process of moving its corporate records from Star's Port Arthur plant. These records were Texaco records that predated Star's 1989 formation and were being moved in the normal course of business. (II R. 67, 72, 115, 137-38). This effort to preserve the documents eventually led to the present proceedings.

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[1] Star was formed as a general partnership of Saudi Refining, Inc. and Texaco Refining and Marketing (East) Inc., each of which own a 50% interest in Star's assets. (II R. 67). Saudi Refining, Inc. is a wholly-owned subsidiary of Aramco Services Company. *Id.* Texaco Refining and Marketing (East) Inc. is a wholly-owned subsidiary of Texaco Refining and Marketing Inc., which is a wholly-owned subsidiary of TRMI Holdings Inc., which is in turn a wholly-owned subsidiary of Texaco Inc. ("Texaco"). *Id.* Although Texaco is the indirect parent of one of Star's partners, Star is a stand-alone entity with its own officers responsible for the ordinary and usual business and affairs of the partnership. (II R. 68).

Matthews Smith is currently the Senior Coordinator of Human Resources assigned to personnel services at Star's Port Arthur plant. In early December 1996, Smith became aware that documents were being removed from the Port Arthur plant and he called his attorney. (II R. 16). On Friday, December 6, 1996, counsel for Smith applied for an *ex parte* temporary restraining order from the 172nd District Court of Jefferson County, Texas. (I R. 6-10, 14-15, 22-25). The application for temporary restraining order stated that Smith intended to file a class action discrimination lawsuit "in the near future," and that Star and Texaco should therefore be enjoined from "directly or indirectly destroying, tampering with, altering, disposing of, moving, destroying, shredding, cutting, or in any other way changing Defendants' documents or materials." (I R. 7-9). The state district court issued the temporary restraining order.

II. *Proceedings Below*

After the state court issued the temporary restraining order, the case was removed to the United States District Court for the Eastern District of Texas (I R. 1-2), and a preliminary injunction hearing was held. During the hearing, Smith testified that he felt he had been discriminated against in promotions, advancement, compensation, and appraisals because he is African-American. (II R. 7, 27). Smith claimed that he believed that such alleged discriminatory practices and policies existed company-wide at Star and had an adverse impact on African-American employees. (II R. 8, 25). Smith made the blanket assertion that it was his belief that there were documents at Star and Texaco that supported his allegations of discrimination. (II R. 8, 34). Smith admitted that he was not sure what documents were being moved: "Mostly I think engineering services. . . and perhaps some human resource employee relation files." (II R. 17; *see also* II R. 16, 18, 46).

Smith did not know whether these documents were Texaco or Star documents, how old they were, or if they had anything to do with employee relations.[2] (II R. 41-42). In fact, the only mention of any danger of document destruction was an attempt by Smith to connect his case with the Texaco race discrimination case which was saturating the news at that time. Despite Smith's failure to present any evidence that any danger of document destruction existed in the present action, the district court, on January 2, 1997, entered its memorandum opinion and preliminary injunction under a $50,000 bond. (I R. 169-81) (both reproduced in the Appendix as A-2 and A-12 respectively).[3]

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[2] Smith testified that he thought some Star employee relations documents were stored in the Old Records Room. (II R. 42). There was no testimony that these documents were being moved. The undisputed testimony at the preliminary injunction hearing established that only Texaco documents predating the formation of Star were being moved. (II R. 41-42, 102-103, 135). The records being moved were primarily refining and marketing records and real estate records. (II R. 120). There were very few human resources records among the pre-1989 Texaco records and any personnel files of Star employees who were previously Texaco employees were to remain in the possession of Star. (II R. 99, 104, 122-23, 125, 135-36).

[3]The preliminary injunction provided, in part:

> The defendant Star Enterprise shall log and index any and all records of employment changes in pay, benefits, promotions, changes of positions, demotions, or other pertinent employment decisions at all of its locations within the United States of America until further order of this court. All of these records (past, present, and future) shall be open to the plaintiff and his attorneys at mutually agreeable time [sic] during normal working hours upon five working days' notice. If the parties cannot mutually agree on such times for inspection, the court will set such times upon application of either party.

Star filed a motion in the district court to stay the injunction pending appeal. (I R. 186-96).[4] The district court entered an order denying Star's motion to stay. (I R. 238-41). Star then filed a motion in the Fifth Circuit to stay the injunction pending appeal and to expedite the appeal, which was granted. (I Supp. R. 41).

On February 10, 1997, while Star's motion to stay the preliminary injunction was pending in the Fifth Circuit, Smith filed a First Amended Complaint in the district court alleging race discrimination on behalf of a class of African-American employees. He then filed a motion requesting that the court enter a document preservation order consisting of paragraphs 1 through 4 of the preliminary injunction and that the order be issued "without the bond requirement and without the built-in inflexibility of endless interlocutory review." (I Supp. R. 37-40). The district court issued the document preservation orders despite Smith's failure to show that Star had altered or destroyed relevant documents or would alter or destroy any relevant documents, and without requiring that Smith post a bond. *Id.* The "Document Preservation Orders" issued by the district court commanded Texaco, Smith, and Star, including Star's "agents, servants, and any other person or entity acting for or on behalf of defendant Star Enterprise, or any person or entity having actual or constructive notice of this order," to preserve all documents, rough drafts, and e-mails "related to" the underlying action. (I Supp. R. 129-38) (Star's document preservation order is reproduced in the Appendix as A-15).

(I R. 171).

[4] At this stage of the proceedings, Texaco followed a procedural path similar to Star's. The motions filed by Texaco are not covered in this petition, for the sake of brevity.

On March 14, 1997, Star filed a motion for clarification and for a stay of the document preservation order with the district court. (I Supp. R. 158-74). The district court issued an order denying the motion. (I Supp. R. 317). Star filed, in the Fifth Circuit, its motion to stay the document preservation order after the Fifth Circuit issued an order consolidating the preliminary injunction appeal and the appeal of the document preservation order. The Fifth Circuit denied Star's motion to stay on April 22, 1997.

On June 3, 1997, the parties presented oral argument to a Fifth Circuit panel. Immediately following the argument, the panel affirmed without opinion. On June 16, 1997, Star filed a petition for panel rehearing with the Fifth Circuit, which was denied on August 4.

REASONS FOR GRANTING THE PETITION

Smith originally sought a temporary restraining order to preserve the status quo--to stop the movement of existing documents from Star's facilities to those of Texaco in Tulsa, Oklahoma. Rather than narrowly tailoring the preliminary injunction or the document preservation order to the movement of those documents, the orders issued by the district court regulated documents to be created in the future such as e-mails and drafts. Retention of rough drafts was required based upon the district court's belief that such drafts "can and often do evidence subjective intent." As a result, the district court has substantially altered and restrained Star's entire communicative process, resulting in a prior restraint on speech.

No Federal Rule of Civil Procedure provides for document preservation orders. The only basis for these orders seems to be a popular reference manual, *The Manual for*

Complex Litigation, which states that courts "should consider whether to enter an order requiring the parties to preserve and retain documents, files, and records that may be relevant to the litigation." *Manual for Complex Litigation* § 21.44 at 75 (3d ed. 1995). In recent years, judges who wish to take control of the discovery process have begun to issue a greater number of document preservation orders. *See HBJ, Inc. v. American Home Prods. Corp.*, 1994 WL 31005, at *1 (N.D. Ill. February 1, 1994); *In re Continental Ill. Sec. Litig.*, 750 F. Supp. 868, 881-82 (N.D. Ill. 1990), *rev'd* 962 F.2d 566 (7th Cir. 1992); *see also Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 Emory L.J. 1085, 1094 n.44 (1987).

However, many of these orders, similar to the ones issued by the district court in the present case, are overly burdensome and onerous. Some include restrictions on future communications in hard copy or electronic form and constitute a prior restraint on speech, curtailing the First Amendment rights of those affected by the orders. Although these orders may be tailored to limit their effect on speech, this Court has recognized that any such restraint must be carefully scrutinized. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (stating that "[a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity"). Despite the orders' infringement of personal liberties, courts continue to issue them without authority or guidelines under the Federal rules, even though other remedies are available to discourage and punish document destruction.

Numerous courts have held that parties are subject to sanctions, up to and including dismissal, as a result of the destruction of evidence. *See, e.g., Pepsi-Cola Bottling Co. v. Cargill, Inc.*, No. 3-95-784, 1995 WL 783610, at *3 (D. Minn.

Oct. 20, 1995) (citing parties' obligation to preserve evidence based on the "spoilation of evidence" and related doctrines); *see also Shepherd v. American Broadcasting Co., Inc.*, 151 F.R.D. 194, 198 (D.C. Cir. 1993) (stating that a party has obligation to preserve and not to alter documents it knew or reasonably should have known were relevant to the litigation); *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 267 (8th Cir. 1993) (holding that sanctions for destruction of evidence were appropriate even though evidence was destroyed before case was filed and that party had not violated discovery order). EEOC regulations give the EEOC the right to obtain a federal court order requiring an employer to comply with its record-keeping obligations. *See, e.g., E.E.O.C. v. Rogers Brothers, Inc.*, 470 F.2d 965 (5th Cir. 1972). Additionally, a court may provide redress for the destruction of evidence through its sanctioning power under rule 37 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 37; *Lamar Financial Corp. v. Adams*, 918 F.2d 564, 566-67 (5th Cir. 1990). Courts have also held that a fact finder in a Title VII action may draw an adverse inference of discrimination where it is found that a defendant has intentionally destroyed evidence. *See, e.g., Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 661 n.7 (5th Cir. 1983) (adverse inference); *Jackson v. Harvard University*, 721 F. Supp. 1397, 1413 (D. Mass. 1989), *aff'd*, 900 F.2d 464 (1st Cir. 1990). In sum, many safeguards exist to protect the parties' interests in preserving relevant evidence.

This case raises the issue of the extent federal courts should become involved, not just in ordering the preservation of *existing* documents, but in controlling how such documents are created in the future, and thereby managing and limiting the freedom of expression of the affected party. Requiring the preservation of documentary evidence in existence at the time a suit is filed differs markedly from requiring the retention of

all documents which may be created in the future, whether such documents are in final or draft form and whether such documents are in a paper or electronic media. Once the court enters an order affecting the creation of future documents, it has taken a giant step toward shaping not only the form of communications, but also those communications themselves. The ultimate questions for this Court are: (1) whether the prior restraint on free speech in this case is a necessary and acceptable burden for the court to impose upon an involuntary party in the litigation process; (2) whether Congress or the Supreme Court has authorized the use of such orders to affect future communications of a party, beyond the safeguards that already provide for preservation of evidence in litigation; and (3) whether the district court erred in issuing the injunction and the document preservation order.

I. *The Preliminary Injunction and the "Document Preservation Order" Constitute an Unconstitutional Prior Restraint on Free Speech*

The present proceeding began as a simple request from Star's general counsel that Texaco remove its documents from Star's facilities in what essentially was a housecleaning measure. However, possibly because of allegations in the *New York Times* related to tape recordings in an unrelated Texaco race discrimination suit, the district court granted the plaintiff's far-reaching request to enjoin the destruction, alteration, or movement of documents in connection with claims he had not yet filed either with the court or the EEOC. In reality, the plaintiff brought forth no evidence of any danger of document destruction and the district court exceeded its authority in issuing the preliminary injunction and, subsequently, the "document preservation order."

This is not an isolated problem. As discussed earlier, courts are frequently issuing injunctive document preservation orders. *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 Emory L.J. 1085, 1094 n.44 (1987). Indeed, during oral argument, the Fifth Circuit equated the orders in the present action with "evidence freeze" orders that are routinely entered in products liability actions.

In a products liability case, the item that must be preserved for litigation purposes--a pipe, tire rim, etc.--is the *offending* item. The item must be preserved because all parties are aware that it is essential to the disposition of the case. In this action, however, the documents, rough drafts, and e-mails in question have not been shown to be "offending" items. In fact, testimony at the preliminary injunction hearing indicated that Smith is unaware of what type of documents are contained in the numerous boxes that Texaco sought to move. (II R. 41-42). Further, and significantly, future communications such as the e-mails and drafts regulated by the orders cannot be considered *offending* items because they did not even exist at the time the order was entered, and there is no evidence that they bear any nexus to the adverse employment actions of which Smith complains. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding that statements made by employees must have nexus to adverse employment decision to be considered evidence in Title VII action). The orders by the district court and the decision of the Fifth Circuit to affirm those actions have facilitated Smith's blind "fishing expedition."

Further, in products liability cases, the number of items involved is very limited. A pipe manufacturer can take the allegedly defective pipe and place it in a warehouse--or even an

office--and store it with ease. In such a case, the item is, without a doubt, "evidence."

However, in this action, an enormous amount of documents, rough drafts, and e-mails falls within the scope of the district court's orders. Thousands of documents currently in existence are regulated by the district court's preliminary injunction and "document preservation order." More importantly, as long as this litigation continues, an infinite number of documents, e-mail communications, and drafts *to be created in the future* will also fall within the scope of the district court's orders. Whereas in products liability cases the parties know of the existence and the identity of the offending item, thereby making it easy to find and store, the document preservation order in this proceeding concerns electronic and paper "documents" that are not in existence and that will be created by hundreds of employees. Consequently, the amount of information and the burdens imposed by the orders, far exceed the small burdens that parties face in preserving a defective piece of pipe in a products liability action.

Smith entered this litigation seeking to preserve the status quo--to stop the movement of a narrowly defined group of documents from Port Arthur, Texas, to Tulsa, Oklahoma. Had the district court narrowly regulated the movement of those documents, then the situation could be compared to the evidence freeze in a products liability case. However, rather than preserve a piece of evidence, the document preservation orders issued by the district court are so extensive and burdensome that they effectively control the employers' communicative processes and constitute a prior restraint on the speech of employees.

In doing so, serious free speech concerns under the First Amendment of the United States Constitution have been raised. Although the orders of this type do not prohibit speech by employees outright, it is well settled that the First Amendment protects against government inhibition of speech as well as outright prohibition. *Fabulous Associates, Inc. v. Penn. Pub. Utility Comm'n*, 896 F.2d 780, 785 (3d Cir. 1990) (quoting *Lamont v. Postmaster General*, 381 U.S. 301, 309 (1965) (Brennan, J., concurring)). Government action that chills constitutionally protected speech violates the First Amendment. *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996).

As this Court has stated, "[a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *see also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The heavy presumption against prior restraints is premised on "a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Southeastern Promotions*, 420 U.S. at 559.

This Court has consistently protected the First Amendment rights of employees in the workplace. *See, e.g., Waters v. Churchill*, 511 U.S. 661, 668-69 (1994); *Connick v. Myers*, 461 U.S. 138, 140 (1983). Orders of the type issued by the district court have a chilling effect on the speech of employees because of the specter of "Big Brother" looking over their shoulders with each rough draft of a memo they write and each e-mail they send. The Star employees know that Star is involved in a serious discrimination lawsuit, and they know that they may be required to keep each document they create, but they are not attorneys or constitutional scholars. Because

they know that their "rough speech" in drafts and e-mail may have to be preserved, they may fear that as a result of the lawsuit, those who review the communications will be overly sensitive--or overly "politically correct."

For example, two employees who express their opinions, even by sarcasm, hyperbole, or jokes, via e-mail or by notes on rough drafts of documents, may exercise restraint, for fear that their ideas or opinions may come under scrutiny. The document preservation orders state that all rough drafts of documents must be preserved because such drafts "can, and often do, evidence subjective intent." This statement implicates the free speech rights of the employer, as well as the employees, because the possibility of liability leaves the employer with no choice but to scrutinize, stifle, or even prevent the expression of the employees. Wayne Lindsey Robbins, Jr., *When Two Liberal Values Collide in an Era of "Political Correctness": First Amendment Protection as a Check on Speech-Based Title VII Hostile Environment Claims*, 47 Baylor L. Rev. 789, 796 (1995) (hereinafter "Robbins").

The stifling of creativity and the chilling effect on lower-level employees will have a corresponding negative effect on the higher level administration of an employer. Employers want robust and uninhibited communications between their employees regarding their job duties; a "dumb idea" may spark an excellent idea--or it may not be so dumb in the first place. But the employer will never know this if employees are unable to brainstorm or are afraid to speak. In addition, employees themselves may hesitate before discussing important issues of the day, such as affirmative action, minority contracting, diversity, and even the notoriety of the previously mentioned Texaco race discrimination case.

The possibility that employees may write offensive e-mails or comments on drafts does not remove the constitutional protection afforded the employees' speech. Even though the speech, once uttered, may subject a party to liability based on what was expressed, this possibility does not eliminate the constitutional protection against a prior restraint. This Court protects speech that is controversial as well as noncontroversial speech. *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959); *see also Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting) (expressing belief that freedom of speech guaranteed by First Amendment "must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish"); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985) (stating that citizens may propagate ideas of the Ku Klux Klan, the Nazis, and the Communists, as well as criticize the President because "above all else, the First Amendment means the government has no power to restrict expression because of its message [or] its ideas"), *aff'd*, 475 U.S. 1001 (1986). Simply put, it is the offensiveness of a statement which should guarantee constitutional protection for the statements at issue because "the public expression of ideas *may not be prohibited* merely because the ideas are themselves offensive to some of their hearers." Robbins at 804 (emphasis added) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969) (citations omitted)).

Further, employees who are used to bouncing ideas off of each other may avoid doing so as a result of the district court's orders. As Nobel Prize winner Linus Pauling once stated, "The best way to get a good idea is to get a lot of ideas." Prior restraints stop the free flow of information in the marketplace of ideas and chill expression on important issues. *See* Robbins at 791. This Court has noted that "[t]he special

vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speakers before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973); *see also NAACP v. Button*, 371 U.S. 415, 429 (1963) (the First Amendment protects communications in the form of "abstract discussion").

The orders have a chilling effect on employees similar to that in *Community-Service Broadcasting of Mid-America, Inc. v. Federal Communications Comm'n*, 593 F.2d 1102 (D.C. Cir. 1978) and *Pentco, Inc. v. Moody*, 474 F. Supp. 1001 (S.D. Ohio 1978). In *Community-Service Broadcasting*, the D.C. Circuit sitting *en banc* considered an FCC regulation requiring all noncommercial educational radio and television stations to make audio recordings of all broadcasts "in which any issue of public importance is discussed." *Community-Service Broadcasting*, 593 F.2d at 1104. The court held that the increased potential for government censorship could cause local stations "to fear and to dilute their public affairs coverage," thus causing a chilling effect on the speech of the stations. *Id.* at 1117. Calling the chill "of the most serious dimensions," *id.* at 1118, the court ruled that the FCC regulation was unconstitutional. *Id.* at 1123. Likewise, in *Pentco* the court considered a city ordinance that required all massage parlors to maintain records of the identities of their customers. The court held that the record requirement would have a chilling effect on the free association rights of both the customers and the parlors. *Pentco*, 474 F. Supp. at 1008. Similarly, in the instant case, the likelihood that the court, the plaintiffs, the attorneys, the company and the company's managers will be scrutinizing employees' rough drafts and e-mails, may cause the employer to restrict employee

communications thereby chilling free speech, or causing the employees to censor their own speech, and even stopping communications through drafts or e-mails.

Orders such as the ones issued by the district court have the potential to disrupt significant aspects of the communicative process at a company, both in the developmental and retention stages of communications. Employees need the freedom to make and correct errors and develop ideas through the use of successive drafts of a document. A first draft is often no more than a "lump of clay" which is never intended to be the final communication. Yet, the orders create a situation in which even the most ill-formed thoughts and creative efforts placed in rough drafts and e-mails are subject to management, legal, and judicial review. In *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-02 (1981), this Court held that an order that limited communications between parties and potential class members was an abuse of discretion, avoiding review of whether the order was an unconstitutional prior restraint on expression in violation of the First Amendment. However, the Court also emphasized that the order was subject to heightened review due to the infringement upon the parties' free speech rights under the First Amendment. *Id.* at 104 n.21. As in *Gulf Oil*, the orders issued in the present action have the same potential and the district court should have required a showing of compelling need for the order before issuing it. *Id.* at 102.

This Court has stated that prior restraints of expression can be justified only by the most compelling governmental interests. *See, e.g., Nebraska Press Ass'n v. United States*, 427 U.S. 539, 558-59 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Bantam*

Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). The only governmental interest at stake in the present proceeding, and in other similar cases, is the interest in preserving relevant evidence for litigation. However, when dealing with fundamental First Amendment rights, "the State may not employ `means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982) (citations omitted). The methods the district court used to advance its interest in preserving relevant evidence are not narrowly tailored because sufficient safeguards are already in place to prevent document destruction in the form of the doctrine of spoliation, EEOC regulations, and the fact that courts will allow an adverse inference against any party found to have destroyed evidence. Thus, injunctive document preservation orders are superfluous and are not a narrow or justifiable means of preserving evidence. Instead, they unnecessarily fetter a company's communicative process by court supervision, and stifle the free speech rights of the employees.

In sum, the effect of injunctive document preservation orders, such as the ones issued in the present case, is to chill the speech of affected employees in violation of the First Amendment to the United States Constitution. The prior restraints at issue are not narrowly tailored to meet the important governmental interest in document preservation during litigation, an interest that is already served by other mechanisms provided by existing laws, court rules, and agency regulations. Any small benefit from injunctive supplementation of these mechanisms is outweighed by the detrimental effect such injunctive orders will have on the freedom of expression. Consequently, the Court should hear this action in order to prevent the abuse of injunctive document

preservation requirements, to protect litigants from the unconstitutional prior restraint that such orders impose on free expression, and to provide guidance for the lower courts on their use.

II. *District Courts Do Not Have the Power to Issue Injunctive Document Preservation Orders*

Courts lack the power to issue an injunctive document preservation order, whether it is styled as a preliminary injunction or as a document preservation order. Document production is governed by Fed. R. Civ. P. 34, which contemplates orders by judges to produce, not preserve, documents. No federal rule of civil procedure authorizes a document preservation order. The only "authority" cited, and the only "authority" that exists for such orders, is the *Manual for Complex Litigation*, which has no authoritative force over the courts of the United States. The *Manual* is merely a reference guide and not a statute or rule. In fact, the manual itself states that it

> is offered as an aid to management, not as a treatise on matters of substantive or procedural law . . . the text cannot be assumed to remain a current and comprehensive statement of the law. Nor is the manual intended for citation as authority on points of law or as a statement of official policy.

Manual for Complex Litigation § 10.2 at 5 (3d ed. 1995).

By continuing to issue document preservation orders under the "authority" of the *Manual for Complex Litigation*, courts are ignoring the Manual's own disavowal of official

authority. In addition, because the orders are procedural, the only valid authority for a document preservation order would be a Federal Rule of Civil Procedure enacted through the mechanism of the Rules Enabling Act. This Act provides that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals." 28 U.S.C. § 2072. However, as stated above, no such rule exists for document preservation orders. Thus, allowing courts to issue such orders permits them to circumvent the procedure envisioned by Congress in creating the Rules Enabling Act.

Accordingly, district courts have been issuing document preservation orders, which can lead to enormous expense and hardship on a party, without any authority to do so, and without any controls, guidelines, or procedures from this Court. This Court should hear the instant proceeding to prevent courts from circumventing the Rules Enabling Act and to ensure that courts will operate in a uniform manner in accordance with the Federal Rules of Civil Procedure.

III. *The Decision Below was Erroneous*

All of the extraordinary alterations of Star's normal course of business evolved out of a simple request made in May, 1996 by Star's General Counsel that Texaco move its old records from Star facilities. From this minor event, major burdens have been imposed upon Star's normal method of doing business. Star petitions this Court for relief from these burdens because the court of appeals erred when it affirmed the actions of the district court.

Even though Smith had not yet filed his lawsuit, the district court entered an extraordinarily burdensome

preliminary injunction that required Star to make and furnish documents to Smith, retain voluminous records, and cease the moving of records in the ordinary course of business. Even when the district court modified the injunction under another name, "Document Preservation Order," the injunction remained vague and unreasonably burdensome.

The four prerequisites for issuance of an injunction are: (1) the movant must show a substantial likelihood that he will prevail on the merits; (2) the movant must show that he will suffer irreparable injury unless the injunction issues; (3) the movant must show that the threatened injury to him outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the movant must show that the public interest would not be adversely affected by the injunction. *United States v. Jefferson County*, 720 F.2d 1511, 1519 (5th Cir. 1983). The burden of persuasion on all of the four requirements is at all times on the movant. *Id.*

However, Smith wholly failed to meet his burden. First, Smith failed to show that a substantial likelihood existed that he would succeed on the merits, and he brought forth no evidence of any danger that any documents would be destroyed. Second, Smith failed to establish that he would suffer irreparable injury unless the injunction and/or the "document preservation order" issued. Smith never established that Star did anything improper, destroyed even one document, or was reasonably likely to do so in the future. *See Humble Oil & Ref. Co. v. Harang*, 262 F. Supp. 39, 43 (E.D. La. 1966). Third, Smith did not show that any threatened injury to him outweighed the damage caused to Star as a result of the injunction and document preservation order. Finally, Smith failed to show that the public interest would be unharmed by such an order. Extraordinary injunctive relief, such as the

preliminary injunction and the "document preservation order," creates a dangerous precedent by allowing parties to circumvent normal discovery procedures, resulting in unnecessary burdens on the court and the public.

Thus, the district court granted the overly broad preliminary injunction and reissued it in modified form, despite Smith's failure to meet any one of the four requirements for an injunction. Consequently, the appellate court erred in not finding that the district court abused its discretion in issuing such unnecessary and burdensome orders.

IV. *The Questions Presented are Important*

Document preservation orders have become more prevalent in recent years. However, courts have no authoritative guidance for how and under what circumstances to issue such orders. As a result, many of these orders are unduly burdensome and often infringe upon the fundamental rights of the individuals, including the employers and employees affected by them. Although the orders do not directly regulate speech, the orders do have an effect on how the citizens express their opinions and on which topics the employees in an affected company discuss. It is these types of regulations--regulations that serve to subtly restrain speech at its origin--that the First Amendment was enacted to prevent:

> Do the people of this land . . . desire to preserve those [liberties] so carefully protected by the First Amendment . . . ? If so, let them withstand all *beginnings* of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost

> because its possessors failed to stretch forth a saving hand while yet there was time.

Associated Press v. NLRB, 301 U.S. 103, 141 (1937) (Southerland, J., dissenting). These words by Justice Southerland underscore the need for this Court's intervention in the present case.

This proceeding provides the Court an opportunity to issue guidance to the lower courts, to limit the issuance of unnecessary and burdensome orders, and to prevent a threat to the freedom of expression the Constitution protects. In this case, the district court issued the injunctive document preservation orders without any showing by the plaintiffs that there was any need, much less a compelling need, for such orders.

Circumventing the normal discovery procedures and the established mechanisms to ensure document retention by granting extraordinary injunctive relief creates a dangerous precedent. Given the opportunity, a greater number of future litigants may seek to gain an advantage by requesting onerous record-keeping and record-access obligations on the opposing party without the encumbrance of a bond, all premised on the "possibility" that alteration or destruction of documents could occur in the indefinite future. As one court stated:

> The necessity for the injunction must be demonstrated clearly. Injunctions will not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties. . . .

> Were the fact that a party to a law suit would suffer irreparable injury if a document were destroyed the sole test for the issuance of an injunction to prevent its destruction, injunctions should issue in every case in which important documents are within the control of either party. Obviously, this is not done and should not be done.

Humble Oil, 262 F. Supp. at 42-43. The interests of the parties are protected by the already existing mechanisms discussed above, and the injunctive document retention efforts of the various district courts often serve simply to increase the cost of the litigation and add extra time to the normal pretrial process.

This case presents the Court with an opportunity to address the issue of unreasonably burdensome document preservation orders that chill the right of free expression under the First Amendment and that courts are granting without authority either under the Federal statutes or rules of civil procedure. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: November 3, 1997
Houston, Texas

Respectfully submitted,

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APPENDIX

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-40087
Consolidated with
No. 97-40295

U.S. COURT OF APPEALS

FILED

JUN 03 1997

CHARLES R. FULBRUGE III
CLERK

MATTHEWS SMITH,

Plaintiff-Appellee,

v.

TEXACO, INC.; ET AL.,

Defendants,

STAR ENTERPRISES; TEXACO, INC.,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Texas

Before WIENER and PARKER, Circuit Judges, and LITTLE, District Judge.*

PER CURIAM:**

AFFIRMED. See Local Rule 47.6

*Chief United States District Judge for the Western District of Louisiana, sitting by designation.

**Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Matthews SMITH, et al, Plaintiffs,

v.

TEXACO INC., Texaco Chemical Company and Star Enterprise, Inc., Defendants.

No. 1:96-CV-0749.

United States District Court,
E.D. Texas,
Beaumont Division.

Jan. 2, 1997.

Employee sued his employer in state court for race discrimination. Following removal to federal court, employee sought to remand case to state court and employer sought to dissolve temporary restraining order previously entered by state district court, preventing employer from removing certain documents from state. The District Court, Cobb, J., held that: (1) employee pled essentially federal claim within district court's removal jurisdiction, and (2) court would not dissolve temporary restraining order.

Denied.

1. Removal of Cases k25(1)

For defendant to remove state court action to federal court, absent diversity jurisdiction, federal question must appear on face of plaintiff's well-pleaded complaint. 28 U.S.C.A. § 1441.

2. Removal of Cases k25(1)

As general rule, federal defense to state law claim does not create removal jurisdiction. 28 U.S.C.A. § 1441.

3. Removal of Cases k 25(1)

Employee's state court action, on its face, pled essentially federal claim under § 1981, within district court's removal jurisdiction, by alleging that facially neutral promotion,

advancement, and compensation practices which were applied company-wide throughout United States disparately impacted African-Americans. 28 U.S.C.A. § 1441; 42 U.S.C.A. § 1981.

4. Civil Rights k148, 152

Prima facie case of racial discrimination in violation of § 1981 may be shown by demonstrating that African-Americans are disparately impacted by employer's wage and promotion policies, and where gross statistical disparities can be shown they alone may constitute prima facie proof of pattern or practice of discrimination. 42 U.S.C.A. § 1981.

5. Injunction k150

Court would not dissolve temporary restraining order restraining employer accused of racial discrimination in violation of § 1981 from moving certain employment records out of state, but would permit employer to move certain documents and certain notations concerning payroll and to delete electronic records in the ordinary and usual course of business, where employee showed statistical underrepresentation of African-Americans in workforce, documents might otherwise be removed, destroyed, or altered, and fully and adequately litigating claim fostered public policy against race discrimination in employment. 42 U.S.C.A. § 1981.

6. Civil Rights k241

Statistical evidence may be used to prove that subjective promotional system has classwide discriminatory intent in violation of § 1981. 42 U.S.C.A. § 1981.

James Erick Payne, Provost & Umphrey, Beaumont, TX, for Plaintiffs.

Stephen Fred Fink, Thompson & Knight, Dallas, TX and Paul W. Gertz, Germer & Gertz, Beaumont, TX, for Defendant Texaco, Inc.

V. Scott Kneese, Bracewell & Patterson, Houston, TX and Robert J. Hambright, Orgain, Bell & Tucker, Beaumont, TX, for Star Enterprise.

MEMORANDUM OPINION

COBB, District Judge.

Before the court is Plaintiff Matthews Smith's (Smith) motion seeking to remand this case to state court, and defendants' Texaco, Inc. (Texaco) and Star Enterprise, Inc. (Star Enterprise) motions seeking to dissolve the temporary restraining order (TRO) previously entered by the state district court in this removal action pursuant to Fed.R.Civ.P. 65(b) and to deny a temporary injunction.

The court has conducted a preliminary injunction hearing and reviewed the parties' written submissions and oral arguments. For the reasons given below, both the plaintiff's and the defendants' motions will be denied.

Background

Plaintiff Smith is employed by the Human Resources Department at the Port Arthur, Texas refinery operated by Star Enterprise, previously owned by Texaco. On December 6, 1996, Smith obtained a TRO from state court, which enjoined defendants from moving, altering or deleting any records which might pertain to Smith's (personal and as an anticipated class representative) claims of employment discrimination against Star Enterprise (and possibly Texaco).

Star Enterprise was formed as a joint venture under New York partnership law on January 1, 1989. Star Enterprise is owned 50% by an indirect subsidiary of Texaco and 50% by Saudi Refining, Inc.

The state court TRO pertains to Texaco because Texaco shares all employee performance and appraisal records with Star Enterprise to determine seniority or when employees chose to switch employment between these two companies.

This occurs with some regularity, but not on a scheduled basis.

Specifically, Smith alleges that Star Enterprise's facially neutral employee appraisal and promotion system discriminates against him and other African-American employees. At the preliminary injunction hearing held before this court, it was determined that of about 50 people at Star Enterprise's nationwide human resources group only 1 or 2 are African-Americans. The evidence also showed that while between 17 to 21 people worked in Star Enterprise's Port Arthur facility's Human Resources Department, Smith was the only African-American in that department since 1984. Despite having high qualifications, a Master's Degree in Public Administration with an emphasis in Budgeting and Personnel Services, Smith was the only employee in the Star Enterprise's Port Arthur facility's Human Resources Department who has not been promoted since 1985, a period of 11 years. Other persons who are caucasian, but with less educational background and with less seniority have been promoted, received raises, and given supervisory positions during those 11 years. But not Smith.

The evidence also showed that even as the state court issued its TRO on December 6, 1996, Star Enterprise attempted to move certain files from the "Old Records Room" in the Port Arthur plant to Tulsa, Oklahoma. The record indicates that but for Smith's efforts to enforce the TRO, Star Enterprise would have moved out of Texas to a Texaco records storage facility in Tulsa, Oklahoma certain employment records, possibly essential for making Smith's case, and certainly relevant to the claim or the defense. Texaco has the exclusive control of the Tulsa records center.

Discussion

1. This Case was Properly Removed to Federal Court

[1, 2] A defendant may remove a state court action to federal court if such an action could have been filed in the federal court originally. 28 U.S.C. § 1441; *Aaron v. National Union Fire Ins. Co.*, 876 F.2d 1157, 1160-1161 (5th Cir.1989).

When, as in the present case, there is no diversity jurisdiction, a federal question must appear on the face of the plaintiff's "well-pleaded complaint" for removal to be proper. *Id.; see also Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366 (5th Cir.1995) ("A defendant ... must show that a federal right is an element, and an essential one, of the plaintiff's cause of action.") (citations omitted). The general rule, thus, is that a federal defense to a state law claim does not create removal jurisdiction. *Aaron*, 876 F.2d at 1161.

[3] In the present case, the plaintiff's pleading in the state court action, on its face, asserts an essentially federal claim (See Appendix) The relevant portion of the plaintiff's pleading alleges:

> Defendants have engaged and are continuing to engage in unfair and racially motivated discriminatory practices against Plaintiff and other African-American employees of Star Enterprise. There are discriminatory practices and policies at Defendants' facilities that determine promotions, advancement opportunities and compensation which **apply Company-wide throughout the United States.** The specific practice includes "facially-neutral" decision-making systems that, in their application, have a disproportionate adverse impact on African-American employees.

Plaintiff's Application for Temporary Restraining Order at III (emphasis added).

[4] Defendants properly point out that the above-quoted allegation states a cause of action which is exclusively federal in nature. 42 U.S.C. § 1981 makes it unlawful for an employer to discriminate on the basis of race in promotion and wage decisions. *Page v. U.S. Industries*, 726 F.2d 1038 (5th Cir.1984); *Boykin v. Georgia-Pacific Corp.*, 706 F.2d 1384 (5th Cir.1983). A prima facie case of such racial discrimination may be shown by demonstrating that African-Americans are "disparately impacted" by the employer's wage and promotion policies; that is, "Where gross statistical disparities

can be shown, they alone may ... constitute prima facie proof of a pattern or practice of discrimination."[1] *Boykin*, 706 F.2d at 1390 (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977)).

Indeed, when the plaintiff alleges that Star Enterprise's promotion policies where determined by:

> **'facially-neutral' decision-making systems that, in their application, have a disproportionate adverse impact on African-American employees,**

he conforms perfectly to the Fifth Circuit's requirements for pleading the issue of disparate impact under section 1981:

> **A prima facie case of disparate impact must be shown by identification of a neutral employment practice coupled with proof of its discriminatory impact on one class of employees in the employer's workforce.**

Page, 726 F.2d at 1053 (emphasis added). Accordingly, a section 1981 claim is clearly discernable from the face of the plaintiff's pleadings.

While the plaintiff argues that there is no federal question jurisdiction because an employment discrimination case may

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[1] This court is aware that Title VII also prohibits discrimination in employment on the basis of race. *See* 42 U.S.C. §2000e. However, Title VII establishes an administrative procedure—i) file timely charge with the EEOC; ii) receive notice of right to sue—which a complaining employee must follow before filing a lawsuit in federal court. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147 (1974); 42 U.S.C. § 2000e-5(b), (c), (e). Because the plaintiff failed to plead the procedural prerequisites for a federal lawsuit under Title VII, this court cannot construe a plausible federal question over this lawsuit under Title VII. However, a disparate impact claim may be made under section 1981 even if such a claim may not be brought pursuant to Title VII. *Page v. U.S. Industries, Inc.*, 726 F.2d 1038, 1041 n. 2 (5th Cir.1984).

be brought under the Texas Commission on Human Rights Act (TCHRA), Tex.Lab.Code Ann. §§ 21.001 et seq., it is fatal to his argument that he alleges that Star Enterprise's discrimination practices were **"Company-wide throughout the United States,"**[2] while TCHRA pertains to Texas employers only. Tex.Lab.Code Ann. §§ 21.001. Thus, a federal question, specifically a section 1981 claim, necessarily appears on the face of the plaintiff's pleading. Therefore, the plaintiff's Motion to Remand is in all things denied.

2. Preliminary Injunction

This court may grant a preliminary injunction if: "(1) the movant has a substantial likelihood of eventual success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs the damage which the injunction may cause the opponent; and (4) the injunction would not be adverse to the public interest." *Productos Carnic, S.A. v. Cent. Am. Beef, Etc.*, 621 F.2d 683 (5th Cir.1980).

a. Success on the Merits.

[5, 6] The court finds that the evidence presented at the hearing on December 20, 1996 shows that the plaintiff met his burden of showing a likelihood of success on the merits. Statistical evidence may be used to prove that a subjective promotional system has a classwide discriminatory impact. *Page*, 726 F.2d at 1046-1047. This court finds it startling that of at least 50 people in Star Enterprise's nationwide human resources group only one or possibly two are African-Americans. Though there were between 17 to 21 people in the Star Enterprise's Port Arthur facility's Human Resources Department, Smith was the only African-American to work in

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[2] During a hearing before this court the plaintiff has alleged that such discriminatory practices may occur not merely in Port Arthur, Texas, but also at Star Enterprise's refineries in Delaware City, Delaware, and Convent, Louisiana, and in Star Enterprise's principal marketing facility in Atlanta, Georgia.

that department since 1984. Despite having high qualifications, a Master's Degree in Public Administration with an emphasis in Budgeting and Personnel Services, Smith, who is forty-two was the only employee in the Star Enterprise's Port Arthur facilility's Human Resources Department who has not been promoted since 1985, a period of 11 years.[3] At the very least, this court is persuaded that there is a substantial likelihood that Smith will succeed on the merits were he to bring a section 1981 claim.

b. Irreparable Injury.

The evidence before this court indicates that on December 6, 1996, or the day on which the state court issued its TRO, Star Enterprise has attempted to move certain files from its "Old Records Room" in the Port Arthur refinery to Tulsa, Oklahoma for storage in the Texaco records center. The evidence shows that the files which Star Enterprises attempted to move might have been essential for making the plaintiff's case. It is also clear that but for Smith notifying Star Enterprise of the state court's TRO, documents which could prove his case would have been removed from Port Arthur, Texas. If any documents relevant to the plaintiff's discrimination claim are removed, destroyed, or altered, the plaintiff and the class he anticipates he will represent will likely suffer irreparable harm in proving their racial discrimination claim.

c. Balancing the Equities.

Defendants argue that compliance with the injunction might cause more harm than good, viz. disruption of ordinary business activity. To accommodate the defendants' concerns, the court will modify the original state court TRO to permit the moving of certain documents, and certain notations

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[3] Even if *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (decided when the plaintiff was an infant), had eradicated race discrimination once and for all (wishful thinking) this court cannot help but wonder that given the evidence before it whether Smith, 42, could possibly assert a cognizable claim of age discrimination.

concerning payroll, if doing so is in the ordinary and usual course of the defendants' business; provided, however, that the plaintiffs' rights to inspect documents relevant to their race discrimination case shall not be impaired. Moreover, to mitigate the high costs associated with electronic document storage, the court will permit defendants to delete electronic records in the ordinary and usual course of business; provided, however, that hard copy records be made and kept of any and all electronic records of the various Human Resources records, as well as any new data used to report various actions, and the status of employees to any governmental authority, state local, or federal, if the defendants choose to delete such records. With such modifications, the threat of harm to the plaintiffs outweighs any harm to the defendants which the injunction might cause.

d. Public Policy.

Sound public policy abhors racial discrimination in employment promotions. Indeed, such discrimination is insidious, and violates our sense of human decency. Accordingly, an injunction which would enable the plaintiff to litigate fully and adequately his race discrimination claim fosters sound public policy.

Conclusion

For the reasons given above, the plaintiffs' Motion to Remand is in all things denied and the defendants' Motions to Dissolve the Temporary Restraining Order and Deny a Temporary Injunction are denied.

APPENDIX

42 U.S.C. § 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the **same right in every State and Territory to make and enforce contracts ... and to the full and equal benefit**

of all laws and proceedings for the security of persons and property as is **enjoyed by white citizens** ...

(b) "Make and enforce contracts" defined

For purposes of this section, the term **"make and enforce contracts"** includes the **making, performance, modification, and termination of contracts,** and the **enjoyment of all benefits, privileges, terms, and conditions of contractual relationship.**

(c) Protection against impairment

The rights protected by this section are protected **against impairment by nongovernmental discrimination** and impairment under color of State law.

Paragraph III of Plaintiff's Petition

Defendants have engaged and are continuing to engage in **unfair and racially motivated discriminatory practices against Plaintiff and other African-American employees of Star Enterprise.** There are **discriminatory practices** and policies at Defendants' facilities that **determine promotions, advancement opportunities and compensation** which apply Company-wide **throughout the United States.** The specific practice includes "facially-neutral" decision-making systems that, in their application, have a disproportionate **adverse impact on African-American employees.** More specifically Plaintiff, Matthews Smith has been subjected to discriminatory practices and policies in Defendants' evaluation system, job posting, compensation/pay-grade systems and promotions. By using these discriminatory practices and policies, Defendants have engaged in a **pattern and practice of intentional discrimination against Plaintiff and other African-American employees of Star Enterprise.**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED CLERK
U.S. DISTRICT COURT
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TX EASTERN BEAUMONT
BY /s/ Barbara ???

MATTHEWS SMITH, ET AL	§	
V.	§	
TEXACO INC., TEXACO CHEMICAL COMPANY, AND STAR ENTERPRISE, INC.	§	NO. 1:96-CV-0749

PRELIMINARY INJUNCTION

The presiding judge of the 172nd District Court District Court of Texas entered a Temporary Restraining Order (TRO) without notice on December 6, 1996. On December 10, 1996, the defendants properly and timely removed this cause to this court, which set the matter for hearing at 2:00 p.m. on December 11, 1996, for possible modification or dissolution of the TRO, and set the hearing for a preliminary injunction to be held on December 20, 1996. The TRO entered by the state court remained in effect it was modified by this court. *Texas v. Wellington Resources Corp.*, 706 F.2d 533 (5th Cir. 1983).

The TRO entered by the state court, supported by affidavit, was modified on December 13, 1996. The parties agreed to continue the modified TRO in effect until the close of business January 3, 1997. The modified TRO is now dissolved, and a preliminary injunction is hereby entered, based upon the facts as proved in the hearing, and for the reasons set forth in the Memorandum Opinion entered by this court on this date.

1. The defendants, Texaco Inc. and Star Enterprise, Inc. (including such defendants' agents, servants, representatives,

insurers, and any other person or entity acting for or on behalf of said defendants, or any person having actual or constructive notice of this order) shall not destroy, alter, change, delete, or make any new notations on documents or electronic materials which were, in any way, involved in the discriminatory practices alleged by the plaintiffs. The defendants Texaco Inc. and Star Enterprise, Inc. (including such defendants' agents, servants, representatives, insurers, and any other person or entity acting for or on behalf of said defendants, or any person having actual or constructive notice of this order), may make any new additions or notations concerning payroll, or similar records which they have or will make in their usual and ordinary course of business. Defendants are moreover enjoined from moving documents or electronic materials which were, in any way, involved in any of the discriminatory practices alleged by the plaintiffs; except that, defendants may move certain documents or materials if doing so is necessary to advance the ordinary and usual business purposes of the defendants, as determined by both industry standards and any internal business standards or policies which defendants have previously imposed on themselves; provided, however, that any moving of such documents or materials shall not impair the plaintiffs' right to inspect such documents or materials, until further order of this court.

2. Any and all electronic communications involving the Human Resources Department of Star Enterprises shall be kept and not destroyed, unless hard paper copies are made and kept, and the electronic tapes may be re-used as necessary. Such hard copies will be logged and indexed.

3. The defendants shall prepare and furnish logs of any and all documents which have been moved from Star-Port Arthur to Texaco at Tulsa, and any such records from Star's three other facilities in Louisiana, Delaware, and Georgia.

4. The defendant Star Enterprise shall log and index any and all records of employment changes in pay, benefits, promotions, changes of positions, demotions, or other pertinent employment decisions at all of its locations within the United

States of America until further order of this court. All of these records (past, present, and future) shall be open to the plaintiff and his attorneys at mutually agreeable time during normal working hours upon five working days' notice. If the parties cannot mutually agree on such times for inspection, the court will set such times upon application of either party.

5. This order shall not become effective unless and until the plaintiff or his attorneys execute and file with the Clerk a bond, in conformity with law, in the amount of Fifty Thousand Dollars ($50,000) with a surety approved by the United States District Clerk, Eastern District of Texas, Beaumont, Texas. The bond shall be filed by the close of business January 7, 1997. If said bond is not so filed, this order is of no effect and the state court Temporary Restraining Order is dissolved, as is this temporary injunction.

SIGNED this 2nd day of January, 1997.

/s/ Howell Cobb
HOWELL COBB
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

EOD 3-4-97

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MATTHEWS SMITH, ET AL	§	
V.	§	NO. 1:96-CV-0749
TEXACO INC., AND STAR ENTERPRISE	§	

Document Preservation Order

Background

Before the court is the motion of plaintiffs Matthews Smith, et al, seeking a document preservation order. *See Manual on Complex Litigation* (3d Ed. 1995) §§ 21.442, 41.34, and § 33, 53 at pp. 352 and 353. The court has considered all of the parties' written submissions and heard their oral argument. The plaintiffs' motion is in all things GRANTED.

This is one of three Document Preservation Orders entered this date in this action. None of the three orders shall be considered by the parties or by this court as a motion to produce any of the "Preserved Documents," or requiring any discovery until a discovery order is entered by the court after either agreement of the parties, or upon motion and hearing, if necessary. Compliance by the parties with this order shall not be construed to waive any claims of confidentiality or privilege which any of the parties may make during the pendency of this case.

I. Definitions

1. "Star Enterprise." The term "Star Enterprise" means defendant Star Enterprise, including defendant Star Enterprise's agents, servants, and any other person or entity acting for or on behalf of defendant Star Enterprise, or any person or entity having actual or constructive notice of this order.

2. "Preserved Documents." The term "Preserved Documents" means all documents, including documents in hard copy, drafts of documents (which can, and often do, evidence subjective intent), documents stored in computer memory, or electronic mail messages to or from Star Enterprise, which relate to any claims based on the alleged racially discriminatory practices or defenses thereto, specifically including all documents relating to: i) promotions, ii) demotions, iii) compensation, iv) training, v) job assignments, vi) job transfers, vii) performance or character evaluations, viii) decisions to hire or terminate employment, and ix) all alleged claims of retaliation by Star Enterprise and Texaco, Inc. against African-American employees, who have attempted to obtain managerial, supervisory, or professional positions with Star Enterprise.

"Preserved Documents" do not include Star Enterprise's electronic back-up system, voice mail messages, and additional copies of an original document upon which no further information has been noted and no existing information has been deleted.

II. Star Enterprise's Duties with Respect to Preserved Documents

1. Star Enterprise shall not destroy, alter, amend, change, delete, or make any new notations on Preserved Documents retained by Star Enterprise as of the date of this order except as provided in Sections II.2 and II.3.

2. Star Enterprise may elect to keep Preserved Documents received or sent in electronic mail form, or stored in computer memory, in either electronic or hard copy form.

3. Star Enterprise may make any new additions to or notations on Preserved Documents which Star Enterprise makes in its usual and ordinary course of business, as determined by both industry standards and any internal business standards or policies which Star Enterprise has previously imposed on itself.

III. Moving of Preserved Documents

1. Star Enterprise may move Preserved Documents only if doing so is necessary to advance Star Enterprise's usual and ordinary business purposes, as determined by both industry standards and any internal business standards or policies which Star Enterprise has previously imposed on itself.

2. Star Enterprise shall prepare, keep, and preserve logs of any and all Texaco, Inc. documents, which have been moved or which will be moved *from* Star Enterprise's record storage facilities in Texas, Louisiana, Delaware, and Georgia to Texaco, Inc.'s facility in Tulsa, Oklahoma. The logs shall be in the usual format that Texaco, Inc. uses to log and index its documents, and no additional "logging and indexing" will be required. However, either Texaco Inc. or Star Enterprise shall retain any and all originals and copies of logs or indexes generated by Texaco Inc.'s usual and ordinary methods of "logging and indexing."

IV. Objections to Inefficient Record Keeping

1. Star Enterprise has in effect various electronic communications systems, including an electronic communications system it denominates as "Cyborg" at its headquarters in Houston, Texas. Any party contending the Document Control Orders entered by the court are unduly burdensome, expensive, inappropriate, or incapable of being adhered to, may file a motion requesting the court to designate an electronic systems analyst to review the electronic communications system, the information sought to be protected and retained, and the objectives of this order; and thereafter, to report to the parties and to the court his or her recommendations for the most efficient means and methods to be employed and effectuated at

the lowest possible cost to the parties, and the least burdensome upon the ongoing operations of Star Enterprise and Texaco, Inc.

V. Initial Disclosure

1. Within 20 days of this order, counsel for each party will submit to opposing counsel a plan for complying with initial disclosure requirements of the Local Rules of the United States District Court, Eastern District of Texas. Such initial disclosure shall be completed by May 1, 1997, unless otherwise ordered by the court. The logs of documents referred to in Section III will be produced upon their completion by Texaco, Inc., which may take somewhat longer. If a party objects to the initial disclosure proposed, the court may schedule a hearing to resolve such objections.

VI. Changes and Clarifications

1. Either party may seek changes or clarification of this order by motion to the court, upon good cause shown.

Signed this 4th day of March, 1997 .

/s/ Howell Cobb
HOWELL COBB
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-40087
consolidated with
No. 97-40295

CORRECTED

U.S. COURT OF APPEALS
FILED
AUG 5 1997
CHARLES R. FULBRUGE III
CLERK

MATTHEWS SMITH

Plaintiff - Appellee

v.

TEXACO, INC; Et Al

Defendants

STAR ENTERPRISE; TEXACO, INC

Defendant - Appellant

Appeals from the United States District Court for the
Eastern District of Texas, Beaumont

ON PETITION FOR REHEARING

Before WIENER and PARKER, Circuit Judges, and LITTLE, District Judge.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by appellant, Star Enterprise in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Judge Robert M. Parker
United States Circuit Judge

*United States District Judge for the Western District of Louisiana, sitting by designation.

(2) (2)

Nos. 97-762, 97-770

Supreme Court, U.S.
FILED
DEC 3 1997

In The

Supreme Court of the United States

October Term, 1997

STAR ENTERPRISE,

Petitioner,

-and-

TEXACO, INC.,

Petitioner,

vs.

MATTHEWS SMITH, *et al.*,

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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2688

QUESTIONS PRESENTED

Whether federal courts have the power to issue property-freeze injunctions when the affected property consists of documents and electronically stored information containing evidence relevant to a pending civil action. (Texaco, Inc.'s Question).

Whether an injunction or document preservation order constitutes a prior restraint on free speech in violation of the First Amendment. (Star Enterprise's Question 1).

Whether a district court is authorized to use a document preservation order to affect future communications. (Star Enterprise's Question 2).

Whether the district court erred in granting an overly broad preliminary injunction and then reissued it in modified form despite Smith's failure to meet the requirements for an injunction. (Star Enterprise's Question 3).

PARTIES TO THE PROCEEDINGS

The petitions accurately list the parties to the proceedings

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The Respondents, Matthews Smith, *et al.* ("Smith"), respectfully file this combined brief in opposition to the petitions of Texaco, Inc. ("Texaco") and Star Enterprise ("Star").

STATEMENT OF THE CASE

This is a race discrimination case originally filed by Matthews Smith against Star and Texaco. The primary issue on appeal is whether a federal district court has the authority to require a party refrain from destroying evidence.

Matthews Smith went to work for Texaco in 1980. (2 R. 6). In 1989, Star was formed as a joint venture of an indirect subsidiary of Texaco and Saudi Refining, Inc. Smith went to work for Star at that time. Although Star and Texaco are nominally separate entities, they maintain a close working relationship, and Star employees have always considered themselves to be Texaco employees. (2 R. 12, 46-47, 58, 72, 75, 97). In particular, Star and Texaco share an employee assessment and advancement system that has been the subject of race discrimination litigation for several years.

In 1994, Smith contacted lawyers pursuing an employment discrimination class against Texaco. (2 R. 11). Because of the close relationship between Star and Texaco, Smith expected to be included in that action (2 R. 11-12), but a few days before that case settled, Smith was informed that Star employees had been excluded from the class. (2 R. 9). Shortly thereafter, Smith learned Texaco was removing documents from Star's premises. (2 R. 16). At that point, based on the widely publicized allegations that high-ranking Texaco executives had discussed destroying evidence in the other action, Smith sought to prevent any such document destruction at Star. (2 R. 16-17).

Smith sought and obtained a state court temporary

restraining order (TRO)[1] prohibiting the destruction, alteration, or transportation of documents relevant to his racial discrimination claims. After Smith obtained the state court TRO, he learned that Texaco employees, without interference from the Star manager, were still loading documents into trucks in violation of the TRO.[2] (2 R. 23).

Star then removed Smith's action to federal court, alleging federal question jurisdiction under 28 U.S.C. § 1331 based on a theory that the state court petition raises federal questions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* and Section 1981 of the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981. (1 R. 1-3). Smith filed a motion to remand, alleging that his state court petition did not state a federal claim. The district court ultimately determined that Smith's petition stated a claim under § 1981 and denied the motion. *Smith v. Texaco*, 951 F. Supp. 109 (E.D. Tex. 1997).

Texaco filed a motion to dissolve the state court TRO. (1 R. 80-86). The next day, the district court entered an order modifying the TRO, requiring Smith to post bond and setting a date for a preliminary injunction hearing. The court held a

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1. Smith obtained the TRO in anticipation of a lawsuit to be filed after he had exhausted his administrative remedies under the Texas Commission on Human Rights Act and Title VII. Smith originally sought injunctive relief rather than a document preservation order because he regarded the race discrimination lawsuit as premature.

2. Star allowed Texaco employees to move documents in violation of a court order. (2 R. 23). Petitioners have not claimed that it was permissible to move the documents because they do not relate to Smith's discrimination charges. Rather, the Petitioners admitted that they did not know exactly what was in the boxes they were moving, and Star's human resources director conceded that there were probably records in the old records room that the Plaintiffs should review. (2 R. 102).

hearing, and, finding that the prerequisites for an injunction had been met, issued a memorandum opinion and order granting the preliminary injunction. (1 R. 169-182). Star and Texaco filed notices of appeal. (1 R. 208-209, 210-11).

Both Texaco and Star filed motions to stay the preliminary injunction in the district court, which were denied (1 R. 186-196, 199-207, 238-41), and then in the Fifth Circuit. Smith and others then filed Plaintiffs' First Amended Complaint, formally alleging various violations of 42 U.S.C. § 1981, and seeking class certification. (1 Supp. R. 21-36). Smith then requested document preservation orders as recommended in the *Manual for Complex Litigation*. (1 Supp. R. 37-40). Shortly thereafter, the Fifth Circuit entered an order granting Appellants' motions to stay the preliminary injunction without prejudice to any discovery order that the district court might enter.

After holding a hearing (2 Supp. R.), the district court entered three document preservation orders. (1 Supp. R. 129-38). Star and Texaco appealed the document preservation orders, (1 Supp. R. 158-74, 201), and filed motions to stay, which the Fifth Circuit denied.

The Fifth Circuit heard oral argument and ruled from the bench, affirming without opinion. Star filed a motion for panel rehearing and Texaco filed a suggestion for rehearing *en banc*, both of which were denied.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO REASON TO GRANT THE PETITIONS.

The district court's order was affirmed without opinion, which means that the court of appeals determined that an opinion would have no precedential value. 5th Cir. R. 47.6. Moreover, the "opinion" was unpublished, and carries no precedential value in unrelated cases. 5th Cir. R. 47.5.5. A nonopinion with no precedential value could be wrongly decided, but it cannot create a conflict among the circuits, or with Supreme Court precedent. Moreover, even if the Fifth Circuit had set out its reasons for ruling as it did, there would still be no conflict because no federal appellate court has ever endorsed the positions taken by the Petitioners in this case. The district court correctly applied the law, and the Fifth Circuit correctly affirmed.

In addition, most of the arguments put forth by the Petitioners were not timely raised. Absent manifest injustice, the Fifth Circuit does not consider arguments belatedly raised after appellees have filed their brief. *Najarro v. First Fed. Sav. & Loan*, 918 F.2d 513, 516 (5th Cir. 1990). The general rule in the Fifth Circuit is that if an argument is not raised in a party's principal brief, it is waived. *E.g., id.*; *Stephens v. C.I.T. Group/ Equip. Fin., Inc.*, 955 F.2d 1023, 1026 (5th Cir. 1992); *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540 (5th Cir. 1991).

In its principal brief, Texaco argued that the prerequisites for an injunction had not been met. Texaco went on to argue that a document preservation order is really an injunction, and that the district court lacked authority to enter a document preservation order without complying with Rule 65 and other

requirements for an injunction. Texaco did not challenge the district court's authority to prohibit by injunction the destruction of documents on a proper showing. Although Texaco discussed the inherent powers of federal courts and the limits of equity, it did so only in the context of a document preservation order entered in the absence of the evidentiary showing required for an injunction or without complying with Rule 65. Texaco's contention that federal courts lack the authority to issue property freeze injunctions did not appear in writing until Texaco filed its suggestion for rehearing *en banc*.

Star's arguments also are, for the most part, untimely. Star argued in its principal brief that the requirements for an injunction had not been met, and that the document preservation order was subject to the same standards as an injunction. Star's first two questions presented — the First Amendment prior restraint argument and the future communications argument — appeared in writing at the earliest in Star's Petition for Panel Rehearing. Only Star's third question presented — whether the court erred in granting an overly broad injunction and then reissuing it in modified form as a document preservation order without first meeting the requirements of an injunction — was even arguably properly and timely raised in the court of appeals. Furthermore, many of Star's complaints in its principal brief that could be put down to overbreadth challenges referred specifically to a preliminary injunction that has since been dissolved, not the more narrowly tailored document preservation order that remains in effect.

In sum, the decision of the court of appeals set no precedent and created no conflicts, and the only asserted error that was properly presented to the court of appeals consists of allegedly erroneous factual findings or the misapplication of a correctly stated rule of law. Applying the principles set out in Sup. Ct. R. 10, this case is simply not "certworthy."

II.

THERE IS NO ERROR IN THE FIFTH CIRCUIT'S APPLICATION OF THE LAW TO THE FACTS OF THIS CASE.

A. Federal Courts Have The Authority To Enter Document Preservation Orders.

The district court has within its inherent powers those powers necessary to protect the efficient and orderly administration of justice. *Roadway Express v. Piper*, 447 U.S. 752, 764, 100 S. Ct. 2455, 2463 (1980); *In re Stone*, 986 F.2d 898, 902 (5th Cir. 1993). The preservation of documents and their availability for production is essential to the orderly and expeditious disposition of litigation. *In re Prudential Ins. Co. of America Sales Practices Litig.*, 169 F.R.D. 598, 599 (D.N.J. 1997). Courts' equitable powers regarding destruction of documents are longstanding; the power of chancery in England extended to cases of spoliation of papers. *Gaines v. Chew*, 43 U.S. (Howe) 619, 629 (1844).[3] Moreover, Rule 34 of the Federal Rules of Civil Procedure vests in the district court discretion whether and within what limits and under what conditions the inspection of documents or things should be ordered. 8A Wright, Miller & Marcus, *Federal Practice and Procedure* § 2215, p. 444 (2d 1994); *Swanner v. United States*, 406 F.2d 716, 719 (5th Cir. 1969). If the district court can order a document produced, or sanction a party for failing to preserve it, the court obviously can also order the document preserved.

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3. In footnote 18 of its petition for certiorari, Texaco cites *Gaines*, 43 U.S. (Howe) at 629, as "explaining that at English common law the power of the chancery extended to drawing an adverse inference because of the spoliation of papers." *Gaines* says "The power of chancery in England extends to cases of spoliation of papers, but not to setting up a will of personalty." *Gaines* says nothing about that power consisting of or being limited to drawing an adverse inference.

Document preservation orders are not controversial. In fact, such orders are common in complex litigation. *See, e.g., In re Prudential Ins. Co. of America Sales Practices Litig.*, 169 F.R.D. at 599 (stating that "the preservation of documents and their availability for production is essential to the orderly and expeditious disposition of litigation"); *HBJ, Inc. v. American Home Products Corp.*, 1994 WL 31005 (N.D. Ill. February 1, 1994) (stating that document preservation orders are common in complex litigation); *In re Continental Ill. Sec. Litig.*, 750 F. Supp. 868, 881-882 (N.D. Ill. 1990) (reducing attorneys fees by 75% for pretrial matters such as document preservation orders which are "entered routinely in complex federal litigation"); *In re Wirebound Boxes Antitrust Litig.*, 128 F.R.D. 250 (D. Minn. 1989) (document preservation order consisted on one paragraph of management order); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 104 F.R.D. 119, 121 (C.D. Ca. 1985) (imposing sanction for violation of oral document preservation entered by master); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 750 (E.D.N.Y. 1980) (discussing document preservation order); *Manual for Complex Litigation*, § 21.442, p. 75 (3d ed. 1995) (recommending document preservation and retention orders); Lawrence B. Solum and Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 Emory L. J. 1085, 1094 n.14 (1987) ("Such orders are common, and their violation is a sufficient basis for imposition of discovery sanctions"). Neither Texaco nor Star has cited a single case, treatise, article, or book in which a court or commentator has so much as entertained the idea that federal courts lack the power to order a party to refrain from destroying evidence.[4] The

4. Texaco claims in footnote 12 that a "passionate proponent" of document preservation orders ridiculed arguments that the power to enter such orders can be distilled from the Federal Rules of Civil Procedure, and cites Dale A. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 Tex. L. Rev. 1185 (1983). Texaco's assertion might charitably be attributed to

(Cont'd)

most Texaco or Star has been able to do is point to a mild controversy over whether such orders are essentially injunctive, and therefore subject to the requirements of Rule an injunction, or whether they are run-of-the-mill discovery orders.[5]

Nor is there any controversy over the court's power to, as the Petitioners put it, "criminalize" the destruction of evidence by making it punishable by contempt. Numerous federal appellate courts have held that a party can be sanctioned under the court's inherent powers for destroying documents *even in the absence of a document preservation order*. *E.g.*, *Shepperd v. American Broadcasting Co., Inc.*, 64 F.3d 1469 (D.C. Cir. 1995); *Schmidt v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3rd Cir. 1994); *Uniguard Sec. Ins. Co. v. Lakewood Eng'g & MFG Corp.*,

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(Cont'd)
a remarkably inept misreading if the error had not been pointed out in the briefing before the court of appeals. Professor Oesterle's criticisms were aimed at courts sanctioning parties under Rule 37 for destroying documents *in the absence of a document preservation order*. Professor Oesterle did not question a court's power to impose a document preservation order, and observed that, although document preservation orders do not address prefiling document destruction, they do "avoid the apparent deficiency in Rule 37 for most postfiling document destruction if litigants can convince the judge to enter an order promptly." *Id.* at 1225. Other commentators agree. *See, e.g.*, Iain D. Johnston, *Federal Courts' Authority to Impose Sanctions for Prelitigation or Preorder Spoliation of Evidence*, 156 F.R.D. 313 (1994); Lawrence B. Solum and Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction Of Evidence*, 36 Emory L. J. at 1094 n.14.

5. A few district court cases have analyzed document preservation orders as injunctions. *See Pepsi-Cola Bottling Company of Olean v. Cargill, Inc.*, 1995 WL 783610 *3 (D. Minn., Oct. 20, 1995); *In re Potash Antitrust Litig.*, 1994 LEXIS 20836 (D. Minn. Dec. 5, 1994); *Humble Oil & Ref. Co. v. Harang*, 262 F. Supp. 39, 42 (E.D. La. 1966); *Cunningham v. Bower*, 1989 WL 35993 (D. Kan. 1989).

982 F.2d 363 (9th Cir. 1992); *see also Pressey v. Patterson*, 898 F.2d 1018 (5th Cir. 1990). The only controversy is over whether that power comes from the court's inherent powers or from Rule 37.[6]

Document preservation orders are especially appropriate in race discrimination cases. The *Manual for Complex Litigation* recommends that

> [b]efore the commencement of discovery — and perhaps before the initial conference — the court should consider whether to enter an order requiring the parties to preserve and retain documents, files, and records that may be relevant to the litigation.

Manual for Complex Litigation, § 21.442, p. 75 (3d ed. 1995). In the context of civil rights litigation, where EEOC regulations require an employer faced with an allegation of discrimination to "preserve all records relevant to the charge or action until final resolution of the charge or action," 29 C.F.R. § 1602.14 (1996), the *Manual* points out that

> [t]he parties may disagree on which records are covered by this mandate, particularly with respect to computerized data that may be periodically erased as new information is electronically stored. A separate order of the court may be needed both to clarify what records must be preserved and to provide relief from unduly burdensome retention requirements.

Manual for Complex Litigation, § 33.53, p. 352-53 (3d ed. 1995).

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6. *See, e.g.*, Iain D. Johnston, *Federal Courts' Authority to Impose Sanctions for Prelitigation or Preorder Spoliation of Evidence*, 156 F.R.D. 313 (1994).

In addition to providing a sound basis for imposing appropriate sanctions for the destruction of evidence, document preservation orders are the only effective disincentive to a party's cavalierly allowing evidence to be "accidentally" or "inadvertently" destroyed. For instance, EEOC regulations forbid an employer from destroying any documents related to the claims of a charging party, 29 C.F.R. § 1602.14, but the EEOC's enforcement mechanism only takes effect if the employer knowingly destroys or knowingly fails to maintain records with the intent to defeat the purposes of Title VII, and then the EOS (not the plaintiff) can (not must) recommend (not require) that an "adverse inference" be drawn from the destruction of or failure to maintain evidence, *EEOC Compliance Manual*, § 632.3(b)(2)(ii). Nor does the case law on spoliation provide an adequate remedy. In the absence of a document preservation order or injunction, courts typically require that the document destruction be intentional or in bad faith. *E.g., Eaton Corp. v. Appliance Valves Corp.*, 790 F.2d 874, 878 (Fed. Cir. 1986) (bad faith required for a negative inference); *Jackson v. Harvard Univ.*, 721 F. Supp. 1397, 1413 (D. Mass.), *aff'd*, 900 F.2d 464 (1st Cir.), *cert. denied*, 498 U.S. 848 (1990) (intentional destruction required for adverse inference). A court order or injunction, on the other hand, imposes an affirmative duty on corporate management to ensure that documents are not "inadvertently" destroyed in the usual course of business. *See In re Prudential Ins. Co. of America Sales Practices Litig.*, 169 F.R.D. 598 (D.N.J. 1997).

B. The Fifth Circuit's Decision Does Not Conflict With *De Beers*.

Texaco claims that federal courts lack the power to enter "property freeze injunctions." The district court found and concluded that the requirements for a preliminary injunction were met, and Texaco does not challenge these findings and

conclusions. The issue is not whether document preservation orders are subject to the same rules as injunctions,[7] or whether the district court's findings and conclusions with respect to the propriety of injunctive relief were correct, or whether the preliminary injunction was too broad. The issue is whether under any circumstances a court can enjoin or prohibit a party from destroying evidence.

Texaco cites this Court's decision in *De Beers Consol. Mines v. United States*, 325 U.S. 212 (1945), in support of its argument. In *De Beers*, this Court held that the district court could not use its equity power to freeze an antitrust defendant's assets to ensure the enforceability of a possible fine for contempt if the defendant disobeyed an injunction that the court might issue at the end of the case. In so doing, this Court observed that the assets had nothing to do with the claims being asserted in the case and that the freeze was not interim relief of a kind that might be awarded at the end of the case. *Id.* at 220. The district court injunction in *De Beers* concerned "a matter lying wholly outside the issues in the suit" and was thus inappropriate. *Id.*

The district court's authority to enter document preservation orders in appropriate cases has nothing to do with the issues addressed in *De Beers*. It is not a question of requiring a party to set aside property or post bond to pay a judgment that may or may not ultimately be entered. The court's power to compel the preservation of evidence is central to the court's ability to administer justice. The district court's power to preserve evidence is not "a matter lying wholly outside the issues in the suit," and Texaco can cite no case applying *De Beers* to a situation remotely like the case at bar.

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7. Of course, if Smith is correct that document preservation orders are not injunctions, this issue applies only to the propriety of the now dissolved preliminary injunction and not to the court's authority to enter the document preservation orders.

C. Document Preservation Orders May Apply Prospectively.

Star claims that requiring it to preserve documents such as e-mail violates the First Amendment as a prior restraint on speech. The argument is that Star employees will know that certain communications will be preserved and possibly reviewed by Star management and/or attorneys. The employees may not feel comfortable expressing themselves freely if they know that "Big Brother" (*i.e.*, Star) is looking over their shoulders. In other words, Star claims that it has a right to destroy documents relating to Smith's discrimination claims (which are the only documents required to be preserved) because otherwise Star employees might refrain from e-mailing dirty jokes. While such conduct may, as Star says, be entitled to the highest degree of constitutional protection, it has nothing to do with the document preservation orders. The document preservation order on its face is not a prior restraint on speech. The mere fact that the order may have an incidental effect on free speech does not invalidate it. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665 (1972) (First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability).

EEOC regulations require Star to "preserve all records relevant to the charge or action until final resolution of the charge or action." 29 C.F.R. § 1602.14 (1996).[8] Star does not claim that the EEOC regulations are an unconstitutional prior restraint, or that the government lacks a sufficiently compelling interest to require the preservation of evidence. Star's complaint instead is aimed at speech in no way related to the district court's order.

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8. *The Manual for Complex Litigation* points out that an order such as the district court entered here actually helps a civil rights defendant by clarifying what records must be preserved and providing relief from unduly burdensome retention requirements. *Manual for Complex Litigation*, § 33.53, p. 352-53 (3d ed. 1995).

In other words, with respect to the speech at issue, the order is completely content-neutral, and any chilling would be purely incidental. In contrast, the cases cited by Star dealing with the "chilling effect" of government actions deal with situations in which First Amendment concerns were implicated because the *purpose* of the statute was related to the suppression of free expression; *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1111-12 (D.C. Cir. 1978) (*en banc*) (stating that the strictest scrutiny is applied "where the purpose of a statute is related to the suppression of free expression of ideas or information" and that the legislative history of the statute in question indicated that the purpose of the statute was related to the suppression of speech); or where there was no rational basis for the regulation, *Pentco, Inc. v. Moody*, 474 F. Supp. 1001, 1005 (S.D. Ohio 1978) (no rational basis for requiring disclosure of identities of minor shareholders or limited partners not involved in day-to-day operations of massage parlors). The purpose of the order plainly has a rational basis and is not related to the suppression of free expression of ideas or information — it is related solely to the preservation of evidence for a pending lawsuit.

Moreover, Star's argument proves too much. Star cannot explain how it can comply with EEOC regulations requiring the preservation of documents related to a discrimination charge unless it knows what is in the documents. Presumably, finding out what is in the documents would entail Star management or attorneys reading them. But the possibility that Star managers or attorneys might have read documents is precisely the alleged defect with the document preservation orders. The only difference is that Star knows that it does not have to take EEOC regulations as seriously.

If an order requiring that a party refrain from destroying evidence is an unconstitutional prior restraint on free speech

merely because a person might be less likely to speak if his words became known, then all discovery in every lawsuit is also an unconstitutional prior restraint. Moreover, the alleged "chilling effect" comes not from government scrutiny of Star's documents, but from the possibility that Star might scrutinize its own documents. The problem, if any, is not with the document preservation order, it is with Star's corporate culture.

D. The Fifth Circuit's Decision Is Correct.

Petitioners have maintained that the document preservation orders are really injunctions, and that the court of appeals had jurisdiction under 28 U.S.C. § 1292(a)(1). Smith has maintained that the document preservation orders are non-injunctive discovery orders,[9] and that the court of appeals could exercise jurisdiction over those orders only by treating the appeals as applications for writ of mandamus. *See, e.g., Church of Scientology v. United States*, 113 S. Ct. 447, 452 n.11 (1992)

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9. If an affirmative definition of a § 1292(a)(1) "injunction" must be attempted, it would embrace orders that are directed to a party, enforceable by contempt, and designed to accord or protect "some or all of the substantive relief sought by a complaint" in more than a temporary fashion. No branch of this definition will suffice alone. Many orders directed to a party and enforceable by contempt obviously are not injunctions, such as orders commanding a response to discovery demands.

16 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3922, p. 65-68 (2d 1996) (footnotes omitted). Because preservation of documents is not a part of the substantive relief sought in Plaintiffs' First Amended Complaint, the district court's document preservation order is not immediately appealable as an injunction within the meaning of § 1292(a)(1), but rather is a discovery order entered under the court's inherent authority to protect the orderly and efficient administration of justice.

("As a general rule, a district court's order enforcing a discovery request is not a 'final order' subject to appellate review. A party that seeks to present an objection to a discovery order immediately to a court of appeals must refuse compliance, be held in contempt, and then appeal the contempt order."); *see also Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 101 S. Ct. 669 (1981). It is clear that the court of appeals affirmed the district court's findings and conclusions on the preliminary injunction, which has since been dissolved. It is not clear whether the court of appeals also considered the document preservation orders to be injunctive and affirmed them as well, or considered them to be non-appealable discovery orders that did not meet the requirements for mandamus. Determining whether the preliminary injunction was proper does not, therefore, necessarily put to rest the controversy. Nevertheless, the district court correctly applied the law with respect to the preliminary injunction, and its findings are not clearly erroneous. To the extent the document preservation order can be considered injunctive, it is supported by the same findings and conclusions.

In deciding whether to grant the preliminary injunction, the district court applied the standards set out in *Productos Carnic, S.A. v. Cent. Am. Beef, Etc.*, 621 F.2d 683 (5th Cir. 1980):

> (1) the movant has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs the damage which the injunction may cause the opponent; and (4) the injunction would not be adverse to the public interest.

Star agrees that this is the correct legal standard, but claims in conclusory fashion that Smith failed to make the required showing. The district court's findings are set out in its opinion, and are supported by the record. *See Smith v. Texaco*, 951 F. Supp. 109 (E.D. Tex. 1997).

Star's main objection appears to be its belief that there was no evidence that that there was a danger that any documents would be destroyed. This contention has to be taken with more than just a grain of salt. The only reason the court is reading this brief is that Star wants desperately to destroy many of the documents that had been covered by the district court's preliminary injunction and are now covered by the document preservation order. Star's complaints in its petition for certiorari focus on the requirement that it preserve electronically stored information, but both Star's and Texaco's computer experts testified that documents — e-mail messages in particular — would be destroyed wholesale in the absence of the injunction. For example, Texaco's expert testified that the retention period for e-mail backup tapes is eight weeks, after which the tapes are reused. (2 R. 143-44). Similarly, Star's expert complained that it was a constant fight to get personnel to delete their e-mail and voice messages, and said "we're constantly trying to scrub our files." (2 R. 154). Star's claim that there was no evidence that any documents were in danger of being destroyed is simply not true. As with all the disputed issues raised in the petitions, Star's position finds no support in the facts or in the law.

CONCLUSION

For the reasons stated above, the Petitions should be denied.

Respectfully submitted,

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